No. 93-1121

In The

Supreme Court of the United States

October Term, 1994

ED PLAUT, NANCY McHARDY PLAUT, and JOHN GRADY,

Petitioners,

v.

SPENDTHRIFT FARM, INC., BATEMAN EICHLER, HILL RICHARDS, INC., FRANCIS M. WHEAT, GIBSON, DUNN & CRUTCHER, DELOITTE HASKINS & SELLS, NORMAN D. OWENS, AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. THE COURT SHOULD RESOLVE THE CONSTITUTIONAL ISSUES RAISED BY SECTION 27A(b).

The Respondents initially argue that the Court should avoid constitutional adjudication of the issues it instructed the parties to brief in its order granting the Petition for Writ of Certiorari. Their argument that Section 27A was a codification of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), however, requires this Court to disregard Congress' universally acknowledged legislative purpose and rules of statutory construction which presume that Congress intends to accomplish some legislative result when it acts. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). Furthermore, nothing in the legislative history or the text of Section 27A supports the Respondents' alternative argument that Congress intended Section 27A(b) to apply only to pending cases. The Court should reject the Respondents' argument and decide the constitutional issues.

When the constitutionality of a statute is attacked, the Court may adopt a construction of the statute by which the constitutional questions may be avoided, if such construction is "fairly possible." *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). That principle of statutory construction, however, does not give the Court the prerogative to ignore the "legislative will" in order to avoid constitutional adjudication. " '[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting

the purpose of a statute . . . ' or judicially rewriting it." *Id.* (citation omitted).

Acceptance of the Respondents' argument that Congress was referring to the statute of limitations announced in *Lampf* as the "laws exist[ing] on June 19, 1991," would require this Court to adopt a construction of Section 27A that renders the entire statute a nullity. The result would subvert the manifest legislative will and violate the presumption that Congress intends to effect some legislative result when it acts. *Shamrock Oil & Gas Corp. v. Sheets, supra.* The Respondents' theory that the Courts of Appeal misinterpreted Congress' intent for over forty years until this Court found the true and eternal limitations period for Section 10(b) actions may have some abstract appeal, but *Schor* precludes its use here to avoid constitutional adjudication of the validity of Section 27A.

The Respondents' alternative argument that Congress intended Section 27A(b) to apply only to pending cases is equally unpersuasive. First, the Respondents themselves expressly acknowledge that Congress intended Section 27A(b) to apply to final cases. *See* Respondents' Brief ("Resp.Br.") at 7 (Congress "unmistakably intended" to provide relief even if it meant "reopening dismissed cases.") Second, the text of the statute strongly supports the conclusion that Section 27A(b) was intended to apply to final cases.

Section 27A(a) applies to pending cases and clearly is constitutional.[1] A case remains pending after entry of a court's final order of dismissal with prejudice until all rights of appeal have been exhausted and the time for filing a petition for certiorari has elapsed or a petition has been finally denied. At that time, a case becomes final. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Since Section 27A(a) applies to dismissed pending cases, Section 27A(b) must have been intended to apply principally to dismissed final cases. Furthermore, the provision for the motion to reinstate in Section 27A(b) is vital only in dismissed final cases because a variety of other procedures are available to obtain relief from a final order of dismissal if the case is pending.[2] Therefore, the Respondents' interpretation of Section 27A(b) finds no support in the text or structure of the statute.

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[1] *See, e.g., Freeman v. Laventhol & Horwath*, Nos. 92-6123, 92-6191 (6th Cir. July 21, 1994); *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993); *Cooke v. Manufactured Homes Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993); *Berning v. A.G. Edward & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1841 (1993); *Henderson v. Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S.Ct. 95 (1993).

[2] The procedural device selected by Congress to restore dismissed final cases to pending status – the motion to reinstate – was approved by this Court in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). Until Congress acted, the Petitioners had no procedural or substantive legal basis on which to seek further judicial review of the merits of their claims. Section 27A(b) furnished them with both.

There is no genuine dispute that Congress specifically intended to provide statutory relief to the Petitioners and other plaintiffs in dismissed final cases. This Court must recognize the legislative will, reject the Respondents' opening argument and proceed to consider the constitutionality of Section 27A(b).

II. SECTION 27A(b) DOES NOT CONTRAVENE THE SEPARATION OF POWERS DOCTRINE.

A. The Respondents Misinterpret Section 27A(b) And Argue The Wrong Separation Of Powers Issue.

The Respondents' separation of powers argument rests on two basic propositions. The first is that the separation of powers doctrine forbids Congress from exercising "revisory" authority over judicial judgments. *See* Resp.Br. at 16-28. The second is that Section 27A(b) violates that principle and, therefore, the separation of powers doctrine, because it "reverses" and "revises" final judicial judgments. *See Id.* at 29-43.

The Respondents' argument addresses the separation of powers issues raised by the statute in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). This is not *Hayburn's Case*, however, and Section 27A(b) bears no resemblance to that statute. Section 27A(b) is extraordinary remedial legislation which creates a new statute of limitations and a new right to further judicial review and adjudication for a defined class of securities plaintiffs. Unlike the statute in *Hayburn's Case*, Section 27A(b) does not constitute or authorize adjudication of individual cases or the exercise of appellate-type review over any judicial judgment by a

nonjudicial department. Therefore, it neither confers business of a nonjudicial nature on the federal courts nor interferes with or exercises the Judicial Power.

Because this is not *Hayburn's Case*, the Respondents' Brief fails to address the real separation of powers issues raised by Section 27A(b) and discussed in the Petitioners' Brief ("Pet.Br."). Congress clearly has power to enact new substantive laws which require the federal courts to set aside their previously entered "final judgments" of dismissal with prejudice if the cases are pending when the legislation becomes effective.[3] Consequently, the separation of powers issue presented by Section 27A(b) is *not* whether Congress has the power to require the federal courts to set aside final judgments of dismissal and to apply a new and different substantive (limitations) rule. It can do so and frequently does in pending cases. A case is pending until all rights *of the parties* to further appellate review are exhausted. At that time, the case becomes final. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Therefore, the real separation of powers issue raised by Section 27A(b) is whether the statutory requirement that final cases be *restored to pending status* for further adjudication under the new limitations period by itself constitutes an impermissible legislative exercise of the Judicial Power.

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[3] *See, e.g., The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Memorial Hosp. v. Heckler*, 706 F.2d 1130, 1137 (11th Cir. 1983) ("[U]ntil appellate rights are exhausted, even an otherwise valid judgment may be negated by supervening legislation"). *See also* cases upholding the constitutionality of Section 27A(a) in footnote 1.

In separation of powers cases, this Court focuses on "the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Pacific Mut. Life Ins. Co. v. First RepublicBank Corp.*, 997 F.2d 39, 54 (5th Cir. 1993) (quoting *Schor*). Here, the Respondents have failed to articulate any legitimate reason why legislation which restores final cases to pending status will have any adverse "practical effect" on the constitutionally assigned role of the judiciary. The judiciary's assigned role is to adjudicate – to find facts, apply the current laws and to pronounce judgment. *See Freytag v. Commissioner*, 501 U.S. 868 (1991). Congress' assigned role is to make the laws to be applied by the judiciary – including laws determining when and how the jurisdiction of the lower federal courts shall be invoked and what rights to appellate review shall be available.

The transition of a case from pending to final status has significant consequences for the parties to litigation.[4] The Respondents, however, have failed to demonstrate why the pending/final distinction should provide a bright line between the Legislative Power and the Judicial Power for separation of powers purposes. Creating rights to seek judicial relief is a uniquely legislative act, as is making and changing statutes of limitations. None of those acts even remotely involves adjudication, and adjudication is the essence of the Judicial Power. The fact that legislation creating new substantive rights affects parties to prior adjudications under old law has no practical

[4] The significance is that the parties' right to further appellate review ends, and the judicial judgment attains a degree of finality that is less than absolute. *See, e.g.*, Fed. R. Civ. P. 60(b).

effect on the assigned role of the judiciary to adjudicate, regardless whether the affected cases are pending or final.[5]

The Respondents have failed to show how the restoration of a defined group of final cases to pending status for further adjudication under new substantive rules constitutes a legislative exercise of the Judicial Power or that Section 27A(b) is invalid under any other aspect of the separation of powers doctrine.

B. Section 27A(b) Does Not Deprive The Courts Of Jurisdiction By Subjecting Future Judgments To Nonjudicial Appellate-Type Review.

The Respondents rely heavily on *Hayburn's Case* and its progeny to support their argument that Congress may not exercise "revisory authority" over final judicial judgments. Those cases clearly support the general principle that statutes which purport to authorize a nonjudicial department to exercise *appellate-type review* over final judicial judgments do not invoke the Article III jurisdiction of the federal courts with respect to the subject matter of such judgments. The rationale of those cases is that the contingent nature of the judgments (i.e., that they

[5] In upholding the statute in *Pope v. United States*, 323 U.S. 1 (1944), this Court stated, "[T]he Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before. *And such being its effect, the Act's impact upon the performance by the Court of Claims of its judicial duties seems not to be any different than it would have been if petitioner's claims had not been previously adjudicated there.*" 323 U.S. at 9 (emphasis added).

are subject to nonjudicial review) rendered the business referred by the statutes nonjudicial in nature because the resulting judgments would be in the nature of advisory opinions. Rather than invalidating the statutes, however, this Court generally has dismissed such cases for want of jurisdiction.[6]

Only a few of the other cases cited by the Respondents actually involved statutes that purported to authorize nonjudicial appellate-type review of judgments. In *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865),[7] for example, this Court held that it lacked appellate jurisdiction over Court of Claims judgments because Section 14 of the Court of Claims Act[8] prohibited payment of a Court of Claims judgment until an appropriation therefor

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[6] After the defective statute in *Hayburn's Case* was repealed, Congress certainly could have enacted post-judgment remedial legislation to create a new pension for veterans who the courts had adjudged were ineligible. Such legislation would not have "reviewed" or "reversed" prior final judicial eligibility determinations denying pensions under the old rules, and no separation of powers issues or concerns would have arisen. Section 27A(b) is akin to this hypothetical remedial statute, not the statute in *Hayburn's Case*.

[7] The opinion cited by the Respondents, which was reported at 117 U.S. 697 (1864), Resp.Br. at 24-25, was not the opinion of the Court. *See, e.g., United States v. Jones*, 119 U.S. 477 (1886). The opinion of the Court was published at 69 U.S. (2 Wall.) 561 (1865).

[8] Section 14 of the Court of Claims Act, stated: "That no money shall be paid out of the treasury for any claim passed on by the court of claims till after an appropriation therefor shall have been estimated for by the Secretary of the Treasury." Section 14 subsequently was repealed by Act of Mar. 17, 1866, ch. 19, 14 Stat. 9.

had been "estimated for" by the Secretary of the Treasury. As in *Hayburn's Case*, the contingent nature of the judgments made the causes before the court nonjusticiable, and deprived this Court of appellate jurisdiction. Congress subsequently repealed Section 14, and thereafter the Court of Claims was recognized as an Article III court. *See United States v. Jones*, 119 U.S. 477 (1886).

Similarly, the statute at issue in *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851), authorized the Secretary of the Treasury to determine whether judgments on the claims of Spanish officers for injuries from U.S. Army activities in Florida were "just and equitable" before authorizing payment of same.[9] This Court held that a judgment made under the statute was simply the award of a commissioner and dismissed the appeal for want of jurisdiction. A number of the other cases on which the Respondents rely are to the same effect.[10]

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[9] Section 2 of the 1823 Act provided:

> [I]n all cases where the judges shall decide in favor of the claimants the decisions, with evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the Treaty [of 1819 with Spain], shall pay the amount thereof to the person or persons in whose favor the same is adjudged.

Ferreira, 54 U.S. at 45.

[10] *See Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103 (1948) (Held, administrative determinations regarding air routes unreviewable both before and after President reviewed order of the Civil Aeronautics Board); *District of Columbia v. Eslin*, 183 U.S. 62 (1901) (Held, Court had no jurisdiction to review Court of Claims case where Congress repealed jurisdictional statute prior to the entry of judgment); *In re Sanborn*, 148

Perhaps realizing that neither their separation of powers nor their due process arguments are independently sufficient to sustain their constitutional attack on Section 27A(b), the Respondents' have spun a web of citations to dicta from a blend of *Hayburn's Case*-type cases, due process cases and sovereign immunity cases in the apparent hope that the whole will be greater than the sum of the parts.[11] Their selective quotations of fragments from cases obscure the actual holdings and rationales of the cited authorities, many of which either did not turn on separation of powers issues[12] or merely cited to dicta.[13]

U.S. 222 (1893) (Held, appellant had no right of judicial review of determination of Court of Claims on claim submitted to Interior Department and referred to Court of Claims per statute); *United States v. Waters*, 133 U.S. 208 (1890) (Held, Attorney General without authority to reduce award of attorneys' fees).

[11] The constitutional issues in this case are separate and distinct. The separation of powers doctrine is concerned with the "right" of the judiciary to be a separate and independent branch of government. The Due Process Clause protects the "rights" of persons. The separation of powers doctrine is not concerned with private rights and the Due Process Clause was never intended to protect the judiciary from Congress.

[12] *See United States v. Mitchell*, 463 U.S. 206 (1983) (sovereign immunity case); *Hodges v. Snyder*, 261 U.S. 600 (1923) (due process case); *Massingill v. Downs*, 48 U.S. (2 Dall.) 409 (1792) (federalism case).

[13] *See Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (Held, Court of Claims judges could sit on Court of Appeals panels); *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934) (Held, internal revenue statute at issue, properly construed, did not require or permit post-judgment adjudication by the Commissioner of Internal Revenue); *Williams v. United States*, 289 U.S. 553 (1933) (Held, Court of Claims judges' salaries not constitutionally pro-

The Respondents also gloss over the crucial feature that distinguishes Section 27A(b) from the statutes at issue in *Hayburn's Case* and the other justiciability cases discussed above. Unlike those statutes, Section 27A(b) did not authorize a nonjudicial branch to exercise appellate-type review – to sit as a "court of errors" – to review, revise or reverse final judicial judgments without changing the substantive federal law. A concrete "case or controversy" always has been before this Court and the lower federal courts involved in this case. Nothing in the statute rendered any future judicial determination or judgment contingent in any way. The Respondents may complain that they no longer have the undeserved benefit of the order of dismissal, but that complaint addresses only their due process argument. They have provided no authority that Section 27A(b) either fails to invoke the jurisdiction of this Court or is otherwise invalid under the separation of powers doctrine.

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tected); *United States v. O'Grady's Ex'r*, 89 U.S. (22 Wall.) 641 (1875) (Held, Secretary of the Treasury had no statutory or other authority to deduct income taxes from judgment rendered by Court of Claims); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454 (1870) (Held, statute enacted while case pending provides rule of decision); *Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (Held, Congress may annul a court's prior judgment where public rights are involved); *Georgia Ass'n of Retarded Citizens*, 855 F.2d 805 (11th Cir. 1988) (Held, statute permitting recovery of attorneys' fees did not apply to cases decided prior to statute's enactment).

C. The Provision Restoring Dismissed Final Cases To Pending Status Was Not A Legislative Exercise of the Judicial Power.

The separation of powers doctrine[14] is violated when Congress impermissibly interferes with the exercise of the Judicial Power by the judiciary, *see Nixon v. Administrator of General Services*, 433 U.S. 425, 433 (1977); *United States v. Nixon*, 418 U.S. 683 (1974), or exercises the Judicial Power. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Springer v. Philippine Islands*, 277 U.S. 189, 203 (1928).

Regardless of its precise boundaries, the essence of the Judicial Power is the power to adjudicate – the authority to hear disputes, to determine facts, to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and to pronounce a judgment which determines the rights and liabilities of the disputants. Adjudication involves undertaking to "determine facts, apply a rule of law to those facts, and thus arrive at a decision" – these being "necessary . . . conditions for the

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[14] The Framers vested the executive, legislative and judicial powers in separate branches of the government. The boundaries between the branches are not precisely defined. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). Rather, the Framers contemplated that "practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Moreover, the separation of powers doctrine is applied such that the boundaries between each branch is fixed "according to common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).

exercise of federal judicial power." *Freytag v. Commissioner*, 501 U.S. 868 (1991). *See also Muskrat v. United States*, 219 U.S. 346, 356 (1911); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); *Kuhnert v. United States*, 36 F. Supp. 798 (W.D. Mo. 1941), *aff'd*, 127 F.2d 824 (8th Cir. 1942).

Congress has the power under Article I to amend statutes of limitations to extend the limitations period or revive causes of action that had been extinguished under an old statute. *See, e.g., International Union of Elec. Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229, 243-44 (1976); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945); *Campbell v. Holt*, 115 U.S. 620 (1885). There is no question about Congress' intent to achieve this result through Section 27A. Congress also has broad powers to enact retroactive legislation which may require the courts to set aside their validly entered final judgments in pending cases. *See, e.g., The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Memorial Hosp. v. Heckler*, 706 F.2d 1130, 1137 (11th Cir. 1983). *See also, Freeman v. Laventhol & Horwath*, Nos. 92-6123, 92-6191 (6th Cir. July 21, 1994), in which the Sixth Circuit Court of Appeals upheld the constitutionality of Section 27A(a).

This case was pending until after September 12, 1991, the last day on which the Petitioners could have filed a Notice of Appeal from the final order of dismissal. Fed. R. App. Proc. 4. Had Section 27A been enacted on September 12, 1991, Section 27A(a) would have required the District Court below to set aside its final order of dismissal with prejudice and to proceed with the case under the new statute of limitations, notwithstanding its earlier determination that the action was time-barred under

prior law. *Freeman, supra*. That application of Section 27A(a) clearly would not have involved retroactive "legislative adjudication." *Id*.

Neither the Sixth Circuit Court of Appeals nor the Respondents explain why the status of a case as pending or final defines an impenetrable boundary between the Legislative Power and the Judicial Power.[15] This Court

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[15] Amicus Washington Legal Foundation ("WLF") offers a modest proposal to deal with this issue. It suggests that this Court sweep aside *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) and countless other cases, and adjudge that all retroactive legislation, including that which affects any civil case, pending or final, is unconstitutional. According to WLF, this decree is required by the Due Process Clause and the "Rule of Law," which provides that "the government *in all its actions* is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." WLF Br. at 9 (Emphasis added.) If the foregoing definition correctly states the Rule, its rationale and the tenet that it binds all branches of the government, the adoption of WLF's Rule of Law certainly would mandate the concurrent reversal of the decision to apply Section 9(e) of the 1934 Act to the facts in *Lampf* and the order dismissing this case.

Apparently WLF, like the Respondents, is unable to articulate a separation of powers principle or authority that endows the pending-to-final transition with constitutional significance. WLF's approach would eliminate that problem. In the absence of authority which recognizes either WLF's Rule of Law as a constitutional principle or its novel construction of almost 200 years of well-understood constitutional adjudication, however, a change of that magnitude in our jurisprudence is more properly effected by Constitutional amendment than by application to this Court.

has emphasized that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986), *quoting Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568, 587 (1985). The practical effect of the motion filed by the Petitioners pursuant to Section 27A(b) was to restore this case to "pending" status.[16]

Section 27A(b) survives separation of powers scrutiny because it does not authorize adjudication (including appellate-type review) of individual cases by a nonjudicial branch. If it did so, the statute should be invalid, regardless whether the affected cases were pending or final. Unlike the statute in *Hayburn's Case*, Section 27A(b) takes no power from the judiciary. To the contrary, it expands the jurisdiction of the courts by creating a new right to further judicial review of a defined group of cases under the law as amended.[17] Its enactment was a purely legislative act.

The Respondents fail to diminish *United States v. Sioux Nation*, 448 U.S. 371 (1980), as precedent for legislative reopening of final cases. Their argument that the statute in *Sioux Nation* "did not reopen a final judgment," Resp.Br. at 38, is blind denial. The *only* purpose and effect of that statute was to reopen a single identified *final case*

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[16] Indeed, in what practical sense is this case *not* now pending?

[17] All rights to appellate review of a lower federal court judgment are created by statute. *United States v. Young*, 544 F.2d 415, 416 (9th Cir. 1976), *cert. denied*, 429 U.S. 1024 (1977).

for further judicial review of the *same claim*.[18] The Respondents also fail to answer the Petitioners' argument that the identity of the parties in *Sioux Nation* is irrelevant to a separation of powers analysis. *See* Pet.Br. at 18-19. That the United States was a party or that it arguably was waiving its own rights had no bearing on this Court's prior necessary and separate determination that a statute reopening a final case is not an impermissible legislative exercise of the Judicial Power.

The Respondents' dismissal of the Petitioners' argument that Section 27A(b) created new procedural and substantive rights (Pet.Br. at 22-23) as a "linguistic legerdemain" (Resp.Br. at 36) is nonsense and signifies their inability to rebut it. The lower courts now generally acknowledge that Section 27A "changed the underlying substantive law for § 10(b) claims pending before *Lampf*." *See Freeman v. Laventhol & Horwath, supra,* and the cases upholding Section 27A(a) cited therein. Those cases generally reject the Respondents' arguments that Section 27A violated the rule in *United States v. Klein*, 80 U.S. (13 Wall) 128 (1871)[19] or the retroactivity principles in *James B.*

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[18] "[T]oday the Court permits Congress to reopen that judgment which this Court rendered final upon denying certiorari in 1943." *Sioux Nation*, 448 U.S. at 424 (Rehnquist, J., dissenting). Unlike the statute in *Sioux Nation*, Section 27A(b) applied to a class of cases and changed the substantive law to be applied.

[19] In so ruling, the Sixth Circuit Court of Appeals stated,

> This case is not *Klein*. Section 27A does not direct courts to make specific factual findings or mandate a result in a particular case. It does not remove or alter the courts' constitutional adjudicatory function. Instead, in Section 27A, Congress prescribed a new statute of limitations for the judiciary to apply to all Section 10(b) litigation pending on June 19, 1991. Surely Congress has the power to change a rule of law and make that change applicable to pending cases. Anixter, 977 F.2d at 1545 (cites omitted). We find that § 27A does not direct certain factual findings or impose a rule of decision for § 10(b) claims. Rather, § 27A changed the underlying substantive law for § 10(b) claims pending before *Lampf*. Accordingly, we adopt the Tenth Circuit's analysis of this issue and hold that § 27A (sic) does not violate the separation of powers doctrine.

Freeman, slip op. at ___.

Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991). *Id.* In so holding, they also negate the Respondents' basic characterization and interpretation of Section 27A(b) and eviscerate two key elements of their separation of powers argument.

The distinction between pending cases and final cases is significant. It defines the point at which the parties' rights to further appellate review terminates. That distinction, however, does not define the boundary between the Judicial Power and the Legislative Power. The expiration of a time period that is within the Legislative Power to establish does not convert a valid legislative act into an invalid judicial act. A statute which changes the substantive law and restores dismissed final cases to pending status for further adjudication takes no power from the judiciary. The restoration of *Sioux Nation* certainly has had no adverse practical effect on the ability of the judiciary to perform its assigned role. Section 27A(b) does not violate the separation of powers doctrine.

III. SECTION 27A(b) DOES NOT CONTRAVENE THE FIFTH AMENDMENT DUE PROCESS CLAUSE.

A. The Respondents Appear To Concede That Section 27A(b) Passes Muster Under The Rationality Test Of Due Process.

The Respondents apparently concede, as they must, that the test of due process for the retroactive aspects of legislation is whether they advance "a legitimate legislative purpose furthered by rational means." *See General Motors Corp. v. Romein*, 112 S.Ct. 1105, 1112 (1992), *quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). *See also United States v. Sperry Corp.*, 493 U.S. 52, 64-65 (1989); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). They also seem to concede that Section 27A(b) easily meets that test. Their only attempt to avoid the consequences of those apparent concessions is to argue that the rationality test never has been applied to rights arising from a final judgment. *See* Resp.Br. at 47-48. Even if true, that argument provides no basis for refusing to apply the general constitutional test of due process to Section 27A(b).

B. The Respondents Offer No Justification For Refusing To Apply The Rationality Test.

Rather than explaining why the recently announced due process standard should not apply, the Respondents stubbornly press their claim that the "vested rights" doctrine confers an absolute and inalienable property right to the bar of limitations announced in *Lampf* simply because

it was judicially applied to the facts of this case and this case happened to become final before Section 27A was enacted.

After *Lampf* and *Beam* it required little adjudication to arrive at the conclusion that this action suddenly and unexpectedly became time-barred. The Petitioners did not even oppose entry of the order of dismissal. There is no valid reason why thirty-one days after the entry of an unopposed order of dismissal on limitations grounds the Respondents should fairly be deemed to have acquired a new absolute and immutable property right in the *Lampf* limitations bar, and thus be forever excused from having to answer for their fraud.

Even if the rationality test were not dispositive, the Respondents' claim that the "vested rights" doctrine renders all judgments in final cases sacrosanct cannot withstand scrutiny for the reasons set forth in the Petitioners' Brief. When a case becomes final, the parties' rights are settled. They are not, however, etched in stone. *See, e.g., Federal Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 91 n.6 (1958); Fed. R. Civ. P. 60(b). No principle justifies expanding the consequences of the termination of the parties' right to further litigation to include the creation of the sublime specie of property right now claimed by the Respondents. *See Fleming v. Rhodes*, 331 U.S. 100, 107 (1947).

Congress' legislative purpose to relieve the unprecedented injustice effected by the application of *Lampf* to this case was entirely legitimate. The means chosen were eminently rational. Therefore, Section 27A(b) does not contravene the Fifth Amendment Due Process Clause.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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